BOOK REVIEWS

Standards of American Legislation. By Ernst Freund. Published by the University of Chicago Press. 1917. pp. xx, 327.

In the words of the author this is "an essay of constructive criticism, and not a systematic treatise." After a review of modern tendencies toward social legislation and of the judicial attitude toward such tendencies, Professor Freund devotes several chapters to what may be termed the legal background of his problem. The common law, statutory enactments, state constitutional provisions, and judicial doctrines are each reviewed in turn to discover what they have to contribute to a constructive legislative policy, and in general their contributions are found to be negative and haphazard. In attempting such a broad survey the author must necessarily assume much upon the part of his readers. It is too much, however, to assume that the reader will bring to the book the detailed familiarity with common law and constitutional law requisite to a full appreciation of Chapters II to V. The discussion in this part of the book is often too much in the air. Here and elsewhere the author merely refers to an illustration the facts of which are in his own mind, without giving the reader a sufficient basis for an understanding of the illustration (see for example the comparison between procedural legislation in New York and Illinois, p. 261).

Chapter III has a somewhat misleading title and its parts do not seem to have been organized into a single whole. Chapter IV is a concrete discussion of the extent to which state constitutions have sought to lay down policies of legislation, and Chapter V gives a good review of the development to its present broad scope of due process and similar broad limitations. In one or two cases, as for example, with reference to truck legislation in Missouri (pp. 123-124), some change in statement would be justified by later decisions.

Although in places not sufficiently concrete to be clearly understood by the reader, Chapters I to V do make it clear that neither the common law, nor constitutions, nor decisions based on constitutions, nor all of these together, have given us a body of principles of legislation or materially aided in the development of such a body of principles (pp. 68-71, 167, 172, 214). It is equally clear from the author's discussion that such principles have not been developed by legislatures themselves.

Chapters I to V of this book really construct a background, and it is to Chapter VI on "the meaning of principle in legislation" that we must really look for the author's contribution to the subject under discussion. The author here lays down two principles of legislation: First, the principle of correlation, that is, the principle that all phases of a problem should be regarded in legislating upon it. For example, when the legislature came to increase the property rights of married women, it should under this principle have considered also what increased obligations ought properly to flow from the increase of rights. This is practically a statement that the legislature ought not to look at but one side of the question to be legislated upon. Second, the principle of standardization, which would seek to apply the same or a similar rule to conditions of the same general type wherever they are to be legislated upon. Legislation is not likely to deal at the same time with all the problems of a similar type, but if it did so, a somewhat uniform standard for all would at once appear desirable. With matters of a similar type dealt with piecemeal and at different times, different treatment often results not so much from intention as from want of

thought. To such conditions the author's principle of standardization is clearly applicable and as he says, similar legislative treatment of similar conditions is only to a limited extent produced by judicial applications of the "due process of law" and the "equal protection of the laws" clauses. The substance of these two principles is summed up by the author as follows:

"If correlation means more carefully measured justice, standardization serves to advance the other main objects of law, namely, certainty, objectivity, stability, and uniformity" (p. 248).

The truth of these principles, as of most general statements, may be acknowledged, but they do not help us very much. They amount to a statement that thought should be given to each new enactment in its relation to the rest of the statute book and to the common law, and it must be agreed that such thought is given much too infrequently. The author's discussion is valuable in calling attention to the need for such thought, but he himself seems somewhat doubtful of the value of his principles in the face of a concrete problem presented to the legislature.

With respect to the principle of correlation, the author looks too much upon a legislature as an impartial body seeking to find the best rule for the subject as a whole. As a matter of fact, legislation is the result of a play of interests, with first one interest and then another dominant, and the adjustment of the balance between interests, if it comes, is not likely to come at one time, but through legislation dealing with the same subject throughout a series of years. Legislation upon new subjects is piecemeal and experimental, and while more correlation of opposing interests and of comparable measures is possible, the practical limits of such correlation are more serious than Professor Freund seems to realize. These statements are not so true in private law as in public law, and it is noticeable that most of the author's illustrations of lack of correlation are drawn from the field of public law where the observance of his principle is most difficult.

Problems of standardization again must work themselves out through a series of years, from the first tentative and imperfect legislation in a new field to more perfect legislation, as experience and knowledge increase—the first imperfect legislation often being a necessary basis for the experience that is to produce a more perfect statute. However, this does not involve a denial of the duty of the lawmaker in each case to avail himself systematically of all available data. Absence of standardization, as the author indicates, is nowhere so apparent as in anti-trust legislation (p. 222), but those who saw an existing evil could hardly postpone for twenty-five years the devising of any remedy because of the non-existence of precise standards, with perhaps the realization that such precise standards would not develop even during the period of such delay; in spite of this, much can be said for the anti-trust legislation, ineffective as it seems, on the whole, to have been. And as Professor Freund suggests, the opinion of experts at any particular period constitutes a very poor basis for legislation, for experts change in their views from generation to generation, as knowledge upon any particular subject increases. It is not, therefore, to be concluded that legislation upon existing information should not be enacted to meet an existing evil. As the author suggests, the English factory acts would not have been enacted had the words of so-called experts been accepted as to what were proper standards (p. 249). So far as the principle of standardization insists upon the possession for purposes of legislation of all available information, and the study of the best methods of accomplishing a given result, it is thoroughly acceptable, but how can it aid in determining whether in a new field the thing sought by legislation is desirable or undesirable? Even if it could, these matters of general policy are mainly determined by the play of forces upon the legislature and not by scientific standards. This is recognized (pp. 257, 260, 272) but is

perhaps not given sufficient weight. Here again public legislation of a general type is less likely to be standardized until the policy has been rather fully formulated through successive legislative steps. The old and well-established principles of common law are more likely to be standardized and the same is true of matters capable to some extent of mathematical statement. The administrative features of legislation are more apt to be standardized than the policy of legislation, and, as is suggested by the author, such standardization has taken place too infrequently. The subject of penalties in statutes, it may be agreed, is one which can be standardized, and difference in penalties for similar offenses is more often the result of absence of consideration than of definite thought upon the part of the legislature.

A failure to adopt definite standards is oftentimes due more to the courts than to the legislature. The Illinois general assembly, for example, some years ago passed a law requiring washrooms for workers in bituminous coal mines. The supreme court of the state held this unconstitutional on the ground that it was a special law granting a special privilege or immunity, in that coal miners were favored while persons in other occupations of a similar character were not accorded the right to have washrooms. In view of the fact that the court did not in any way determine what classes of occupations should be brought within the washroom legislation, the general assembly was left either to a specific enumeration, which might again be held improper because of not including all occupations to which the law should apply, or to the use of general terms which should leave to the court by interpretation a determination of the extent of the statutory requirements. This latter arrangement leaves to the employer in each case the determination under threat of penalty of whether or not he is within the terms of the statute, but it was the only alternative of the legislature if it were to act upon the subject at all, and the subsequent law, much more unsatisfactory from the standpoint of any legislative principle, was upheld by the state supreme court (*People v. Solomon*, 1914, 265 Ill. 28). In many cases in Illinois and other states the court has forced upon the legislature a vague and indefinite method of legislation which could be avoided were it not for improper judicial construction of constitutional provisions.

In the concluding chapters of the book under review the author discusses what he terms constructive factors in legislation, and devotes most of his attention to the courts and the legislatures. The courts he finds—correctly, it seems to the reviewer—not to have had much, if any, constructive influence in the development of proper legislative principles. In this connection it may be worth while to suggest that our constitutions form the one important body of codified law in this country. The Constitution of the United States, being somewhat brief, has presented a definite problem, and its interpretation has been worked out by the United States Supreme Court to results that, in general, may be termed satisfactory. The state constitutions, except in a few states, present a more elaborate effort at codification, and in this field judicial interpretation may be studied profitably to determine whether the courts have done much of a constructive character.

The reviewer has just completed the task of going systematically through the judicial construction of the constitution of Illinois, which is a fair example of the more detailed constitutions of the middle west. The constitution of Illinois came into effect in 1870 and for some forty-seven years the supreme court of this state has interpreted its various provisions. As a result of such interpretation it is not too much to say that the constitution to-day is less definite in substantially all of its parts than the language of the text would have seemed at the beginning to indicate. Upon almost every large problem which presented an alternative of construing the language to be definite and precise, or of construing it to be so indefinite and standardless as to leave the determination

in each particular case to the discretion of the court, the court seems to have chosen the latter alternative, so that in most important problems the legislature, when it comes to enact laws, has no guide as to what is constitutional and what unconstitutional, but must enter into a guessing contest with the court—the court, of course, having the last guess. Upon the basis of this particular experience, it appears to the reviewer that perhaps the most serious hazard to legislation in a state with a complicated constitution is the necessity under which the legislature labors in substantially all important legislation of guessing how the court is likely to act after the legislation has been enacted. What is referred to here is not the broad due process of law clause of the constitution, nor other limitations which are themselves broad and indefinable, but constitutional provisions which were intended to mean something specific—provisions into which, by judicial construction, such indefiniteness has been read that the application of the provision in each particular case comes to be a matter within the discretion of the court, without any standard by which the legislation may determine in advance what is and what is not within the limits of the constitution. What has just been referred to constitutes the real hazard of legislation, and a real bar oftentimes to the establishment of either proper correlation or proper standards of legislation, and to such constitutional difficulties the author has given entirely too little attention.

However, this book should be judged, not as a treatise upon the subject of legislation, but rather as what it purports to be, "an essay of constructive criticism." Within the limits set out, Professor Freund has produced a valuable work, and it is to be hoped that in the near future he will give us a book which deals not merely with the general aspects of the subject, but which will also seek to chart out something of the detailed difficulties, for after all it is the details rather than the general principles that constitute the real difficulties in the problem of state legislation to-day.

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Jurisdiction and Practice of Federal Courts. By Charles P. Williams. Published by The F. H. Thomas Law Book Co., St. Louis. 1917. pp. xix, 586.

There are many treatises dealing especially with the jurisdiction and procedure (or practice) of the federal courts not adapted for the law student but intended entirely for the practitioner, *e. g.*, Desty, Foster, Rose, Loveland, Montgomery; there are other treatises devoted largely to equity jurisdiction and practice, *e. g.*, Street, Whitehouse, and Simkins's novel treatise on the questions of jurisdiction and practice arising in the prosecution of an equity suit from its filing to the decree of the court of last resort; also Simkins's *A Federal Suit at Law*, accorded similar treatment, both of which are highly useful in the student's hands but are of greater appeal to the practitioner. Nor is there lack of treatises on the subject intended for law students primarily: Curtis, Hughes and Simonton at once occur to the law teacher.

Curtis's lectures on federal jurisdiction were delivered in 1872-1873 to the students of Harvard Law School, and have a very pleasing style; some discussion of practice is included, but so old a discussion of this subject, no matter how valuable at the time, will not suffice for the present requirements. Curtis preferred to begin at the top of the federal judicial system and work down through the Supreme Court, Circuit Courts and District Courts; Hughes chose the other course and moves from the District Court upwards through the Circuit Court of Appeals and the Supreme Court along the channel through which the suit nor-